Supreme Court, U. S.
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IN THE

# SUPREME COURT OF THE UNITED STATES

October Term, 1978

No. 78-847

UNITED STATES OF AMERICA,

*Respondent,*

*vs.*

HENRY MARTIN,

*Petitioner.*

## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

FRANKLYN M. GIMBEL

RICHARD E. REILLY
*Attorney for Petitioner,*
Henry Martin

GIMBEL, GIMBEL & REILLY
*Of Counsel*
270 East Kilbourn Avenue
Suite 900, MGIC Plaza
Milwaukee, Wisconsin 53202

HAMMERSMITH-BREITHAUPT PRINTING CORP., MILWAUKEE, WIS. 53212

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UNITED STATES OF AMERICA,

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## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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Henry Martin petitions for a Writ of Certiorari to review the decision of the United States Court of Appeals for the Ninth Circuit entered on October 23, 1978.

## OPINION BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit is as of yet unreported and is printed at p. 13 of the appendix.

## JURISDICTION

The judgment of the United States Court of Appeals for the Ninth Circuit was entered on October 23, 1978. The jurisdiction of the Supreme Court is invoked under 28 U.S.C. §1254(1).

## ORDERS

The United States Court of Appeals for the Ninth Circuit affirmed Henry Martin's conviction in the Federal District Court for the District of Oregon on October 23, 1978.

On November 7, 1978 the Petitioner Martin moved the United States Court of Appeals for the Ninth Circuit for its Order Recalling and Staying Mandate.

## QUESTIONS INVOLVED

1. Whether physical evidence seized incident to a warrantless arrest, and statements taken from a defendant after a warrantless arrest, may be properly introduced at the defendant's trial where the underlying arrest had been made without probable cause?
2. Whether the denial of the defendant's motion to dismiss the case for lack of a speedy trial was prejudicial error under the Sixth Amendment of the United States Constitution?

## STATEMENT OF THE CASE

Henry Martin was charged in a seven count indictment in the Federal District of Oregon. The indictment charged Martin and Carol Jean Axtman with interstate



transportation of forged securities in violation of 18 U.S.C. §2314, §2.

The indictment was based on the following facts and circumstances. On about June 1, 1977, a young white female opened several savings accounts with seven Portland, Oregon banks. These accounts were opened with small amounts of cash. On June 2, 1977, the woman returned to the banks and made large deposits. These second deposits were made with checks drawn on a Kaiser Building account with a Milwaukee, Wisconsin bank.

A bank official of one of the Portland banks became suspicious of the woman when she made her second deposit with the Milwaukee, Wisconsin drawn check. The official, believing the checks might be stolen and forged, notified Special Agent Robert Carter of the Portland Federal Bureau of Investigation office.

Agent Carter, apparently on his own investigation, discovered that the woman had opened seven separate accounts with Portland banks under the name of Jane Thompson. In each of the accounts, Ms. Thompson had made deposits using Kaiser Building checks. Agent Carter also learned that the woman was observed by a Portland bank official, entering a large dark blue sedan with two black males. The car was believed to be a recent model Cadillac. Agent Carter then requested the banks involved, to notify the Portland police and the F.B.I. if the woman returned and attempted to make a withdrawal.

On the following day, June 3, 1977, Agent Carter held a briefing with other Portland F.B.I. agents. He informed them of the woman's activities and his belief that she and the two black males with whom she was seen, were perpetrating a bank fraud. Carter also told the agents that he believed the two men were Ernest Knox and Sylvester

Beauford, two Portland area residents. This information was based on Carter's belief that Knox and Beauford had been involved in a similar scheme with a white woman in 1976. Agent Carter at that time displayed photographs of Knox and Beauford.

Later in the morning of June 3, 1977, Carol Jean Axtman, alias Jane Thompson, was arrested by Portland police when she attempted to withdraw cash from a downtown Portland bank. F.B.I. Agents Neil Smith and Robert Hudkins were dispatched to the scene. Smith had attended Agent Carter's earlier briefing, while Hudkins had not. Smith told Hudkins that they should be on the lookout for a large dark late-model sedan being driven by two black men.

About two blocks from the bank where Ms. Axtman was arrested, Agents Smith and Hudkins noticed a dark blue 1976 Chevrolet Impala. Agents Smith and Hudkins parked and entered the bank where Ms. Axtman was being held. Within minutes they left and again saw the blue Impala. The Agents followed the car and requested a license check. They learned the Impala was a rented car.

The Agents continued following the car for one and a half circles around the general area where the bank was located. During this time, the two black men were seen looking to the rear in the general direction of the bank. The Impala stopped briefly and one man got out. He was not observed walking to or into the bank. The driver of the Impala circled the area one more time and then parked and got out. Agents Smith and Hudkins then stopped and got out of their own vehicle. The man who first exited the Impala was now walking back and continued to walk past the parked Impala.



The driver of the Impala was subsequently identified as the Petitioner herein, Henry Martin. The other man was later identified as Howard Collins. Agents Smith and Hudkins approached the men, identified themselves, and interrogated the suspects separately.

At this time, Petitioner Martin told Agent Smith he was Howard Collins and produced a Wisconsin drivers license with Collins' name. He told Smith that he was in town to see a Portland Trailblazer playoff game. He denied knowing any white woman or anything about a bank fraud scheme. He denied knowing the man who had earlier been seen with him in the Impala and who was now being questioned by Agent Hudkins. Martin told Agent Smith that he had parked in order to obtain change. He also stated that he was from Milwaukee, Wisconsin, and employed there by Fact, Inc.

At that point, Agent Hudkins brought Howard Collins over and Petitioner Martin recanted his earlier statement. He acknowledged that he was not Howard Collins but because he did not have his own drivers license with him, he was using Collins' license.

Agent Smith then radioed Agent Carter and told him of the two suspects and their activities. Apparently both Agents Smith and Carter were under the mistaken belief that Martin's employer, Fact, Inc., was the Milwaukee firm on whose account the checks were drawn. Martin was then arrested. Martin's person and briefcase were later searched without a search warrant.

Petitioner Martin moved the District Court to suppress all evidence found on his person and briefcase on the grounds that the arrest was without probable cause. On August 4, 1977, the District Court of Oregon, Hon. James M. Burns presiding, granted Petitioner's motion

insofar as it related to items seized from his briefcase. *United States v. Chadwick,* 433 U.S. 1, 97 S. Ct. 2476, 53 L. Ed. 2d 538. However, Judge Burns denied the motion as to the search of Martin's person on the ground that Agents Smith and Hudkins had probable cause to arrest. Hence the subsequent book-in search was not unreasonable. During this book-in search, a piece of paper was found on Martin with a list of banks corresponding to those at which Carol Jean Axtman had opened accounts. This evidence was used at Martin's trial.

On January 10, 1978, Martin was found guilty on a trial to the Court on all seven counts of the Indictment. On February 27, 1978, Martin was sentenced to a term of 10 years imprisonment. On October 23, 1978, the United States Court of Appeals for the Ninth Circuit affirmed the conviction.

## REASONS FOR GRANTING THE WRIT

### I.

Henry Martin's arrest and subsequent search were made in blatant disregard for the established constitutional standards of probable cause. As such, all evidence found on the person of Henry Martin subsequent to the arrest should have been excluded at trial. In allowing evidence found on Martin to be produced at trial, the District Court of Oregon went far astray of the accepted and usual course of judicial proceedings. The Circuit Court of Appeals for the Ninth Circuit similarly went astray when it approved the District Court's actions. This rank error now calls for the Supreme Court to exercise its powers of supervision over the lower federal courts.

The test for determining if probable cause existed at



the time of arrest has been formulated by this Court as follows:

> Whether at the moment the facts and circumstances within their (officers) knowledge and of which they had reasonably trustworthy information were sufficient to warrant a prudent man in believing that the Petitioner had committed or was committing an offense. *Beck v. Ohio,* 379 U.S. 89, 91 (1964).
>
> Probable cause exists if the facts and circumstances known to the officer warrants a prudent man in believing that the offense has been committed. *Henry v. United States,* 361 U.S. 98, 102 (1959).

At the Petitioner Martin's hearing on his Motion to Suppress, the District Court of Oregon identified eight factors which that Court believed gave Agents Smith and Hudkins probable cause to arrest the Petitioner. The first factor was that the F.B.I. believed that two black men and a white woman were involved in a stolen check scheme. The Petitioner Henry Martin and Howard Collins were both black, and they were both in the vicinity of the bank where Carol Jean Axtman, a white woman, was arrested.

However, in considering what weight the District Court should have given these facts, it is to be noted that the F.B.I. had no information which connected either Henry Martin or Howard Collins with Ms. Axtman. The only possible nexus is that Martin and Collins were black and were seen in a dark blue car. This tenuous connection is not of itself a sufficient basis for probable cause to arrest.

The second factor the District Court identified as tending to support probable cause was that the F.B.I. Agents knew that a similar check scheme had been perpetrated in 1976 by two black men and a white woman.

In truth, this consideration is meaningless. If the F.B.I. could rely on this to help establish probable cause, it would mean that the F.B.I. had reason to believe that any two black men associating with a white woman were suspects of check forgery. But even beyond this, there is a more telling point which would negate probable cause. Agent Smith, the man who arrested the Petitioner had attended the briefing held by Agent Carter. At this briefing, Smith had an opportunity to view photographs of two men the F.B.I. believed were involved in the check scheme. Neither the Petitioner Martin, nor Howard Collins were the men identified by these photographs. This alone should have dispelled any suspicions Agent Smith had about the Petitioner.

The third factor identified by the District Court was that the F.B.I. believed a late-model dark sedan was being used in the scheme and the Petitioner was seen driving such a car. However, the F.B.I. also had reason to believe the car associated with the crime was a Cadillac. As the Petitioner was driving an Impala, whatever suspicions the F.B.I. had about the Petitioner should have been dispelled.

Fourthly, the F.B.I. saw the Petitioner, the alleged driver of the Impala, circling the general area of the bank in question; and saw the Petitioner and Howard Collins looking to the rear in the direction of the bank. This says nothing. It only means that the Petitioner was in the vicinity of a crime. But there are a number of reasonable explanations for the Petitioner's acts. He could just as easily have been looking for a particular address or place of business. At the Motion to Suppress, it was never shown that Petitioner looked directly at the



bank where Axtman was arrested. Nor was it shown that he had some particular interest in that bank.

The District Court noted that Howard Collins walked past the parked Impala when F.B.I. Agents Smith and Hudkins approached. In the Court's view, this was "suspicious." Again there are any number of reasonable explanations. Collins may have been looking for a particular place of business. It was never established that the F.B.I. had reason to believe Collins had gone to or even approached the bank where Axtman was being held.

The Petitioner when questioned by Agent Smith, lied and was evasive about his identity. He in fact claimed to be Howard Collins, produced Howard Collins' drivers license, and denied knowing the man who was in fact, Howard Collins. This fact does raise some suspicion at first light. However, when Petitioner was caught in these falsehoods, he explained that he did not have his own drivers license on him and that he was using Collins'. On its face, this explanation is rational, and the F.B.I. had no reason to believe the Petitioner was lying.

Last, the District Court noted that the F.B.I. knew the Petitioner was driving a rented car. Further, the Petitioner admitted prior to his arrest that he was from Milwaukee, Wisconsin. The significance of this is that the F.B.I. also believed that the checks in question were stolen from a Milwaukee business. But what does this show? At the time the Petitioner was arrested, the F.B.I. had only connected the checks with Ms. Axtman. And the F.B.I. had little, if any, reason to believe that the Petitioner and Howard Collins were associated with Axtman. In fact, the only connections the F.B.I. had at all, were that both Petitioner and Collins were black and were in the vicinity. In this general light, it is worth not-

ing that the record made at the Motion to Suppress does not even make it clear that at the time the Petitioner was arrested as a principal to forgery, the F.B.I. had actual knowledge that the checks passed by Ms. Axtman were forged.

Also, the fact that Petitioner admitted being from Milwaukee should have dispelled any reasonable suspicions about his driving a rented car.

Taking the foregoing considerations, it is obvious that the F.B.I. did not have sufficient information to authorize a warrantless arrest. The state of the law is clear as to the usual course of judicial proceedings when police have made an arrest without probable cause.

> It is conceded that the officers made no attempt to obtain a warrant for Toy's arrest. The simple fact is that on the sparse information at the officers' command, no arrest warrant could have been issued . . . In order to make effective the fundamental constitutional guarantees of sanctity of the home and inviolability of the person (cite omitted), this Court held nearly a century ago that evidence seized during an unlawful search could not constitute proof of the victim of the search. ***Wong Sun v. United States,*** 371 U.S. at 481, 484. Also, ***Brown v. Illinois,*** 422 U.S. 590 (1975).

For these reasons, the District Court should have excluded all evidence obtained from the search of the Petitioner after his arrest. By admitting this evidence, the Petitioner was prejudiced at trial. The Petitioner now urges this Court to exercise its power of supervision to correct this wrong.

## II.

The delay in affording the Petitioner a speedy trial constitutes a violation of the constitutional protection to



which he is entitled under the Sixth Amendment. As set forth in *Baker v. Wingo,* 407 U.S. 514, 33 L.Ed. 2d 101, 92 S. Ct. 2182 (1972), several essential factors which are to be assessed in making this determination are these: (1) the length of the delay, (2) the reason for the delay, (3) the defendant's assertion of his right, and (4) prejudice to the defendant. The Petitioner initially refused to waive his right to a speedy trial upon the Government's request to have the trial judge set the case over in order to allow it to file a Notice of Appeal from the evidentiary suppression decision. It is this action by the Government that constitutes the source of denial of the Petitioner's speedy trial right.

The Government initially filed on October 14, 1977, a Motion for Reconsideration of the District Court's Order to Suppress the Evidence of September 2, 1977. On November 11, 1977, it filed a notice of appeal from the *original* Order. Subsequently the Government moved for voluntary Dismissal under Rule 6(b) of the Rules of the U.S. Court of Appeals for the Ninth Circuit on December 28, 1977. Trial commenced on January 10, 1978.

Petitioner was severely prejudiced in his defense by this postponement and delay. Mr. Collins, who was arrested at the same time as was the defendant, had left the country in the interim and was unavailable to testify on Petitioner's behalf in support of Petitioner's contention that he, Henry Martin, was not involved in the scheme with Jean Axtman.

Given that the Petitioner was severely prejudiced by this delay, it is necessary to determine whether the length of the delay and its rationale can possibly outweigh the infringement upon Petitioner's constitutional guarantee to a speedy trial. Reference to the recently enacted

Speedy Trial Act indicates that the Congressional intent is to have trials commenced within sixty days of arraignment, 18 U.S.C. 3161(c). The Government's October 14, 1977, Motion for Reconsideration of the Trial Judge's suppression order cannot be considered interlocutory appeal under 18 U.S.C. 3161(h)(1)(D), and therefore, the delay period is not excludable under these statutory guidelines. There is also substantial evidence in the trial records to indicate that the Government, as of September 28, 1977 had no intention of filing an appeal from the initial Order to Suppress but then proceeded to do so as late as November 11, 1977. These tactical maneuverings are clearly against the policy embodied in the Speedy Trial Act. If both the public and the individual defendant are to be afforded a speedy trial in the interests of justice, the Government cannot be permitted to obviate this purpose by such delay tactics. In light of the severe prejudice to the presentation of Petitioner's defense which was caused by the delay, the District Court should have granted Petitioner's Motion to Dismiss. The Petitioner again urges this Court to exercise its power of supervision to remedy this infringement upon the Petitioner's constitutional right to a speedy trial.

## CONCLUSION

On the basis of the foregoing argument, and the reasons set forth, I respectfully request that this Court grant its Writ of Certiorari.

*Respectfully submitted,*

RICHARD E. REILLY
*Attorney for Petitioner*



## APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff/Appellee,

vs.

HENRY MARTIN,
Defendant/Appellant.

No. 75-1512
DC CR 77-124-1 JMB

APPEAL from the United States District Court for the District of Oregon (Portland).

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Court for the District of Oregon (Portland) and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this Cause be, and hereby is affirmed.

Filed and entered OCTOBER 23, 1978

(TRUE COPY)

## STATUTES INVOLVED

**18 U.S.C. §2314**

**§2314. Transportation of stolen goods, securities, moneys, fraudulent State tax stamps, or articles used in counterfeiting**

Whoever transports in interstate or foreign commerce any goods, wares, merchandise, securities or money, of

the value of $5,000 or more, knowing the same to have been stolen, converted or taken by fraud; or

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transports or causes to be transported, or induces any person to travel in, or to be transported in interstate commerce in the execution or concealment of a scheme or artifice to defraud that person of money or property having a value of $5,000 or more; or

Whoever, with unlawful or fraudulent intent, transports in interstate or foreign commerce any falsely made, forged, altered, or counterfeited securities or tax stamps, knowing the same to have been falsely made, forged, altered, or counterfeited; or

Whoever, with unlawful or fraudulent intent, transports in interstate or foreign commerce any traveler's check bearing a forged countersignature; or

Whoever, with unlawful or fraudulent intent, transports in interstate or foreign commerce, any tool, implement, or thing used or fitted to be used in falsely making, forging, altering, or counterfeiting any security or tax stamps, or any part thereof —

Shall be fined not more than $10,000 or imprisoned not more than ten years, or both.

This section shall not apply to any falsely made, forged, altered, counterfeited or spurious representation of an obligation or other security of the United States, or of an obligation, bond, certificate, security, treasury note, bill, promise to pay or bank note issued by any foreign government or by a bank or corporation of any foreign country.



**18 U.S.C. §2**

**§2. Principals**

(a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.

(b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal.

**18 U.S.C. §3161 (c) and (h)**

**§3161. Time limits and exclusions**

* * *

(c) The arraignment of a defendant charged in an information or indictment with the commission of an offense shall be held within ten days from the filing date (and making public) of the information or indictment, or from the date a defendant has been ordered held to answer and has appeared before a judicial officer of the court in which such charge is pending whichever date last occurs. Thereafter, where a plea of not guilty is entered, the trial of the defendant shall commence within sixty days from arraignment on the information or indictment at such place, within the district, as fixed by the appropriate judicial officer.

* * *

(h) The following periods of delay shall be excluded in computing the time within which an information or an

indictment must be filed, or in computing the time within which the trial of any such offense must commence:

(1) Any period of delay resulting from other proceedings concerning the defendant, including but not limited to —

* * *

(D) delay resulting from interlocutory appeals;

* * *

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HENRY MARTIN, PETITIONER

*v.*

UNITED STATES OF AMERICA

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*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT*

---

## BRIEF FOR THE UNITED STATES IN OPPOSITION

---

WADE H. MCCREE, JR.
*Solicitor General*

PHILIP B. HEYMANN
*Assistant Attorney General*

ROBERT J. ERICKSON
JOHN F. DEPUE
*Attorneys*
*Department of Justice*
*Washington, D.C. 20530*

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## BRIEF FOR THE UNITED STATES IN OPPOSITION

---

### OPINION BELOW

The court of appeals affirmed petitioner's conviction without opinion.

### JURISDICTION

The judgment of the court of appeals (Pet. App. 13) was entered on October 23, 1978. The petition for a writ of certiorari was filed on November 24, 1978, and is therefore out of time under Rule 22(2) of the Rules of this Court. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## QUESTIONS PRESENTED

1. Whether petitioner's arrest was supported by probable cause.

2. Whether petitioner was denied a speedy trial.

## STATEMENT

Following a jury-waived trial, petitioner was convicted in the United States District Court for the District of Oregon on seven counts of interstate transportation of forged securities, in violation of 18 U.S.C. 2314 and 2. He was sentenced to 10 years' imprisonment. The court of appeals affirmed without opinion (Pet. App. 13).

1. The government's evidence, the sufficiency of which is not disputed, showed that on June 1, 1977, petitioner, a black male, together with co-defendant Carol Axtman, a white female, and another black male rented a blue Chevrolet Impala automobile at the Portland, Oregon Airport, and then registered in adjoining rooms at the Red Lion Motor Inn (Tr. 79-81, 84-86, 106).[1] On the same date Axtman, using the alias Linda Stuart and employing a Wisconsin driver's license as identification, opened savings accounts with small deposits at five Portland banks (Tr. 6, 21-22, 29, 34-35, 40-41). As she left one of the banks, a bank officer saw her enter a large, dark colored automobile occupied by two black males (Tr. 19). On June 2, 1977 she opened accounts in two additional

[1] "Tr." refers to the trial transcript; "S. Tr." refers to the transcript of the pretrial suppression hearing.



banks under the name Jane Thompson (Tr. 45-46, 53). That same day she deposited a check in each of the seven accounts she had opened. The checks, whose amounts totaled approximately $29,000, were drawn by one Karl Stats on a Milwaukee, Wisconsin, bank account of the Kaiser Building Company and were made payable to Axtman under her assumed names (Tr. 13, 25, 31, 38, 43, 48, 55). These instruments were eventually sent to the Milwaukee bank for collection but were returned unpaid because Karl Stats was not an authorized signatory on the Kaiser account (Tr. 66).

An official of one of the banks became suspicious when Axtman made two deposits of Kaiser checks, and notified the FBI. Agent Robert Carter conducted an investigation and discovered the extent of Axtman's activities (S. Tr. 3-5). On the morning of June 3, 1977, Carter briefed other agents assigned to the office concerning the suspected scheme. He informed them that Axtman had been observed with two black men driving a large dark blue car and that he believed the two men were Portland residents who had been involved in a similar scheme with a white woman during the preceding year (S. Tr. 6-8; Tr. 105).

Later that morning Axtman attempted to withdraw $2,000 from the account she had opened at one of the banks; she was arrested after bank officials alerted the police (Tr. 70-71, 73-74). Agent Neil Smith, who had attended Carter's briefing, and Agent Robert Hudkins were called to assist in the arrest (S. Tr.

25-29; Tr. 87, 105). As the agents approached the bank, they observed petitioner, accompanied by another black male, driving a dark blue Impala in the direction of the bank. Both occupants were looking toward the bank but proceeded past it when the agent parked (S. Tr. 22-28; Tr. 90). After the agents entered the bank and learned they were not needed, they returned to their vehicle to look for the Impala. As they pulled out into the traffic, they noticed that they were again behind the Impala. They followed as it made several loops around the block where the bank was located and noticed that the occupants repeatedly looked over their shoulders in the direction of the bank. A radio check revealed that the Impala was a rented car (S. Tr. 29-31, 36, 53; Tr. 91-93).

After circling the bank, the Impala pulled to the curb, and the passenger alighted and walked in the direction of the bank. The car continued on, making another loop around the block in which the bank was located. Petitioner then parked near the bank at a point toward which his former passenger was walking. Upon observing the agents' vehicle, however, the passenger walked past the Impala as if he did not know petitioner (S. Tr. 32, 33; Tr. 95). Stopping their car behind the Impala, Agent Smith approached petitioner for questioning, while Agent Hudkins stopped the passenger for the same purpose (S. Tr. 33-34; Tr. 95-96). Petitioner told the agent that he was Howard Collins and presented a Wisconsin driver's license bearing that name. He denied knowing either the woman who had been arrested in the bank or the person who had been his passenger. He also stated that he was in Portland to attend an athletic event and was simply stopping at the bank to obtain change (S. Tr. 34-35, 44; Tr. 98).



Agent Smith then learned that, upon questioning by Agent Hudkins, the passenger also identified himself as Howard Collins (S. Tr. 57-58; Tr. 98). When petitioner was confronted with this, he admitted that he had lied concerning his own identity and stated that he did know Collins (S. Tr. 36; Tr. 98-99). He then gave a Milwaukee, Wisconsin address and stated that he was an executive of a Milwaukee firm (S. Tr. 37; Tr. 99).

Petitioner was then arrested, and a subsequent search of his person at the United States Marshal's office revealed a piece of Red Lion Motor Inn stationery in his shirt pocket. The paper contained a list of the banks at which Axtman had opened accounts (S. Tr. 39; Tr. 100).

2. Prior to trial, petitioner moved to suppress the fruits of this search, as well as the contents of a briefcase that was seized at the time of the arrest and later searched without a warrant. The court ruled that the arrest was supported by probable cause and that the list was therefore admissible. The court granted the motion insofar as it concerned the warrantless search of the briefcase (S. Tr. 81, 84; Tr. 100; GX 53).

## ARGUMENT

1. Petitioner is incorrect in contending (Pet. 6-10) that his arrest was not supported by probable cause; that contention in any event involves the application of settled principles to the particular facts and does not warrant this Court's review.

First, as the district court noted (S. Tr. 78), petitioner did not challenge the lawfulness of the agents' conduct in initially stopping and questioning him; in any event there was ample reasonable suspicion justifying the investigatory stop under the standards of *Terry* v. *Ohio*, 392 U.S. 1, 21 (1968). See also *United States* v. *Brignoni-Ponce*, 422 U.S. 873, 881 (1975); *Adams* v. *Williams*, 407 U.S. 143, 145-146 (1972). Thus, as the court noted (S. Tr. 76-77), the agents had been notified that Axtman's accomplices were two black men driving a late model dark colored car and also had been advised that persons of a similar description had previously been involved in a similar scheme in the area. By virtue of their driving pattern and furtive observations, petitioner and his passenger demonstrated a particular interest in the bank where Axtman had, only a short time before, attempted to withdraw cash. Suspicion engendered by this conduct was reinforced when the passenger alighted, walked in the direction of the bank and subsequently acted as if he was unfamiliar with petitioner when it became apparent that petitioner's vehicle was the subject of surveillance.

When the information acquired by the agents during the questioning of petitioner is added to the information they previously had, there was ample probable cause to justify the subsequent arrest. In particular, petitioner's denial that he knew his former passenger and his giving a false identity strongly suggested that he was attempting to conceal his complicity in the scheme. Furthermore, the otherwise apparent connection between petitioner and the scheme was reinforced when he revealed that he resided in the same city where the bank, upon which the fraudulent checks were drawn, was located. In sum, all of the foregoing facts supported the agents' reasonable belief that petitioner was involved in a fraudulent scheme, and the search of petitioner's person was thus incident to a lawful arrest.



2. Petitioner also contends (Pet. 10-11) that the delay between termination of the suppression hearing and commencement of the trial constituted a denial of his right to a speedy trial. This claim is unfounded.

Petitioner was arrested on June 3, 1977, indicted on June 14, 1977, and arraigned on June 30, 1977. The suppression hearing was conducted on August 4, 1977, and on August 15, 1977, the court announced its decision to grant petitioner's suppression motion insofar as it concerned the contents of the suitcase (S. Tr. 86). The prosecutor then announced his intention to appeal the ruling and requested that petitioner's case be severed from that of co-defendant Axtman (S. Tr. 87). On September 2, 1977, the court issued an order suppressing the evidence seized from the suitcase, and on September 28, 1977, the govern-

ment moved the court for reconsideration. That motion was denied on October 14, 1977, and on November 11, 1977, the government filed a notice of appeal. The Solicitor General subsequently declined to authorize the appeal, however, and the government withdrew its notice of appeal on December 16, 1977. The appeal was dismissed on December 20, 1977 (Tr. 119).

The trial was held on January 10, 1978. The district court denied petitioner's speedy trial motion, holding that the period between commencement of the suppression hearing and the issuance of the order dismissing the appeal (August 4 to December 20, 1977) was excludable delay under the District's interim speedy trial plan, and that the government was accountable for a total of only 54 days of delay between the indictment and trial (Tr. 119).

Petitioner's claim (Pet. 12) that the delay violated the Speedy Trial Act of 1974, 18 U.S.C. 3161 *et seq.*, is incorrect. The Act provides that in computing the time within which a trial must commence, there shall be excluded "[a]ny period of delay resulting from other proceedings concerning the defendant, including *but not limited to* * * * (D) delay resulting from interlocutory appeals; (E) delay resulting from hearings on pretrial motions * * *" (18 U.S.C. 3161(h)(1)) (emphasis supplied). The period excluded by the district court resulted from a pretrial suppression hearing and reasonably prompt efforts by the prosecutor to seek reconsideration and appeal of the



court's ruling.[2] Furthermore, the mandatory dismissal sanctions of the Act (18 U.S.C. 3162) do not become effective until July 1, 1979 (18 U.S.C. 3163(c)).

Petitioner's claim (Pet. 11) that he was denied his Sixth Amendment right to a speedy trial is also insubstantial. Such claims require a balancing of the length of the delay, the reasons for the delay, and the prejudice to the defendant. Most of the delay of 210 days between indictment and trial was, as the district court found, attributable to the adjudication of petitioner's suppression motion, and was justified as "necessary for the fair administration of 'public justice.'" *United States* v. *Herman*, 576 F.2d 1139, 1146 (5th Cir. 1978). Although petitioner, who was free on bond throughout the period of delay, asserts (Pet. 11) that he was prejudiced because his co-defendant Collins had left the country in the interim and "was unavailable to testify * * * in support of Petitioner's contention that he * * * was not involved in the scheme with Jean Axtman," he offered no reason to suppose that Collins would have testified to that effect. And in view of the evidence adduced at trial, any such testimony would have been plainly incredible. See *Smith* v. *Mabry*, 564 F.2d 249, 253 (8th Cir. 1977), cert. denied, 435 U.S. 907 (1978). Furthermore, as he admitted to the district court (Tr. 3-4), petitioner made no effort to utilize the pro-

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[2] There is no evidence in the record to support petitioner's claim (Pet. 12) that the government never intended to file an appeal.

cedures of Fed. R. Crim. P. 17(e) and 28 U.S.C. 1783, which provide for the issuance of subpoenas to United States citizens in foreign countries. In short, petitioner's bare claim of prejudice does not establish a denial of his right to a speedy trial.

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

WADE H. MCCREE, JR.
*Solicitor General*

PHILIP B. HEYMANN
*Assistant Attorney General*

ROBERT J. ERICKSON
JOHN F. DEPUE
*Attorneys*

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